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**MARTHA KONGSGAARD**, individually  
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GST Exempt Trust U/T/A dated October 21, 1993

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRANCIS WANG, individually and as Trustee  
of WFT-TNG, a California Trust.

Case No. 3:19-cv-00907-AGT

**Plaintiff.**

MARTHA KONGSGAARD, individually and as Trustee of The Martha Kongsgaard GST Exempt Trust U/T/A dated October 21, 1993

**Defendant.**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR LEAVE TO  
AMEND AND SUPPLEMENT  
COMPLAINT AND TO TERMINATE STAY  
OF PROCEEDINGS**

Date: November 6, 2020

Time: 10:00 a.m.

#### Courtroom: A

Judge: Hon. Alex Tse

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1           Defendant Martha Kongsgaard, individually and as Trustee of The Martha Kongsgaard  
 2 GST Exempt Trust U/T/A dated October 21, 1993 (“Kongsgaard”) respectfully submits this  
 3 Memorandum of Points and Authorities in Opposition to Plaintiff Francis Wang’s (“Plaintiff”)  
 4 Motion for Leave to Amend and Supplement Complaint and to Terminate Stay of Proceedings  
 5 (“Motion.”)

6 **I. INTRODUCTION**

7           In a transparent attempt to sidestep this Court’s prior order staying this case, Plaintiff  
 8 brings this sham Motion to lift the stay and amend his complaint solely to obfuscate the  
 9 underlying real property issues in dispute between the parties and drive up Kongsgaard’s  
 10 attorney’s fees and costs. Rather than take accountability for his bad acts and remediate the  
 11 illegal construction and damage that he has caused to Kongsgaard’s property, Plaintiff now once  
 12 again tries to point the finger at someone else for the problems that he alone created.

13           Plaintiff’s Motion should be denied. First, Plaintiff as the moving party bears the burden  
 14 of demonstrating that this matter should not be stayed under the *Colorado River* Doctrine.  
 15 Plaintiff utterly fails to do so and in fact concedes that the federal action and state action arise out  
 16 of the same facts and circumstances. (Motion, p. 7, lines 18-20.) The crux of each of one of  
 17 Plaintiff’s claims is alleged racial discrimination based on enforcement of an alleged contract  
 18 with Kongsgaard to sell him real property and his easement rights in real property, which are  
 19 being adjudicated in the state court proceeding. Thus, his claims in this action rise or fall on the  
 20 state court’s adjudication of the parties’ underlying legal rights to the real property at issue.

21           Second, Plaintiff fails to meet his burden to amend his complaint because the amendment  
 22 is sought in bad faith and is futile. Plaintiff’s amendment merely obfuscates the issues and fails  
 23 to demonstrate any colorable cause of action against Kongsgaard as a matter of law. (Declaration  
 24 of Melissa M. Palozola, hereinafter “Decl. of M. Palozola,” ¶ 6.)

25           Finally, Plaintiff and his counsel should be sanctioned for their improper attempt to  
 26 relitigate the stay in this action, seeking to amend the stayed complaint with baseless and  
 27 frivolous “civil rights” charges, and for intentionally misleading this Court in misstating the facts

1 and truncating the email correspondence between the parties put forth in support of his amended  
 2 complaint. (Id.)

3 **II. THE PARTIES**

4       • Plaintiff Francis Wang and Laura Wang (or Young) reside at 460 Stonecrest Drive.  
 5 They have been cited by Napa County for illegal construction performed without permits on their  
 6 property. (Request for Judicial Notice, hereinafter “RJN,” ¶ 17, Ex. Q.)

7       • Defendant Kongsgaard owns 550 Stonecrest Drive and is married to Peter Goldman  
 8 (referred to collectively, as “Kongsgaard.”) (RJN, ¶ 16, Ex. P.) Kongsgaard was similarly cited  
 9 by Napa County for 2.5 acres of illegal encroachments constructed entirely by Plaintiff without  
 10 Kongsgaard’s permission or knowledge.<sup>1</sup> (Id.) Kongsgaard seeks *inter alia* to quiet title to her  
 11 property in Napa County Superior Court Case No. 19CV000286 filed on February 15, 2019.  
 12 (RJN, ¶ 1, Ex. A.)

13       • Proposed Defendant Peter Brian Peletta resides at 440 Stonecrest Drive. Mr. Peletta  
 14 has been sued by Plaintiff in Napa County Superior Court Case No. 19CV30024 filed on  
 15 February 27, 2019. (RJN, ¶ 7, Ex. G.) Peletta was similarly cited by Napa County for illegal  
 16 encroachments constructed entirely by Plaintiff without Peletta’s permission or knowledge.  
 17 (RJN, ¶ 18, Ex. R.)

18       • Proposed Defendant Al Czap is alleged by Plaintiff to reside at 600 Stonecrest Drive.  
 19 (Proposed First Amended Complaint, hereinafter, “FAC,” p. 3.)

20 **III. PROCEDURAL BACKGROUND**

21       On May 15, 2019, this Court stayed this action pending the outcome of the state court  
 22 proceeding holding, in part, as follows:

23       It is appropriate to stay this case pending the state court litigation. Permitting this case to  
 24 proceed in whole or part while a substantially similar case involving the same property is  
 25 simultaneously litigated in state court would not serve Rule 1’s admonition that the Court  
 26 ensure that just, speedy, and inexpensive determination of every action and proceeding.”  
 27 (Fed. R. Civ. P. 1.) Accordingly, this case is STAYED pursuant to Colorado River. (RJN,  
 28 ¶ 4, Ex. D, p. 10-11.)

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<sup>1</sup> Napa County is, evidently, patiently awaiting resolution of the state court quiet title action before proceeding to enforce these Wang-caused building code violations.

1           The Court further ordered the parties to submit a joints status report every 180 days  
 2 pending the conclusion of the state court proceedings. (Id.)

3           On November 13, 2019, the parties submitted a joint status report updating this Court on  
 4 the state proceedings. (RJN, ¶ 11, Ex. K.) In that report, Plaintiff affirmatively represented to this  
 5 Court that he had no intention of amending his complaint. (Id.) As of the date he made that  
 6 affirmative representation to this court, Plaintiff was in possession of all documents upon which  
 7 he bases his proposed amended pleading. (Id.; Decl. of M. Palozola, ¶ 9, Ex. 6; ¶10.)

8           On September 1, 2020—roughly thirty days before he filed this Motion—Plaintiff  
 9 submitted a second joint status report to this Court. (RJN, ¶ 12, Ex. L.) In that status report,  
 10 Plaintiff affirmatively represented that “the [federal] matter will conclude in state court and  
 11 obviate the need to litigate in this court.” (Id.)

12          The state court action *Kongsgaard v. Wang, et al.* is currently set for trial on March 18,  
 13 2020, before Judge Victoria Wood. (Decl. of MMP, ¶ 5.) Written discovery between the parties  
 14 and production of records from third-party subpoenas are nearing conclusion. (Id.) Party  
 15 depositions are proceeding and set to conclude in October. (Id.)

16          In addition to the Kongsgaard real property, Plaintiff also illegally encroached on  
 17 proposed Defendant Peter Brian Peletta’s property and sued him on February 27, 2019, in Napa  
 18 County Superior in *Francis Wang, et al. v. Peter Brian Peletta*, Case No. 19CV000324. (RJN, ¶  
 19 7, Ex. G; ¶ 18, Ex. R) Notably, Plaintiff has been personally sanctioned by the state court for his  
 20 abuse of the discovery process in that action.<sup>2</sup> (RJN, ¶, Ex. J.) That case is set for trial in less  
 21 than thirty days on November 12, 2020, also before Judge Victoria Wood. (Decl. of MMP, ¶ 4.)

22          On October 7, 2020, Plaintiff proceeded to file a motion to seek leave to file a first  
 23 amended cross-complaint against Martha Kongsgaard in the state court proceeding. (RJN, ¶ 13,  
 24 Ex. M.) In his proposed first amended cross-complaint in the state court action, Wang seeks *inter*  
 25 *alia* to add Mr. Al Czap as a party to the state court proceeding. (Id.)

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26          <sup>2</sup> Despite the State Court order on September 3, 2020, sanctioning Plaintiff \$1,810 for his abuse  
 27 of the discovery process, Plaintiff has still not paid these sums to Mr. Peletta. (Decl. of M.  
 28 Palozola, ¶ 11.) Per court order the funds were due to Mr. Peletta on or before September 13,  
 2020. (RJN, ¶ 10, Ex. J.)

1       On October 8, 2020, Kongsgaard wrote Plaintiff, informed him of the deficiencies with  
 2 his Motion and proposed allowing him leave to amend his complaint in this case provided the  
 3 action would remain stayed pending the state court proceeding. (Decl. of M. Palozola, ¶ 6,  
 4 Ex.1.) Kongsgaard also offered to refrain from seeking sanctions under Rule 11 in the event the  
 5 Plaintiff agreed to stay the federal court action pending resolution of the encroachment and  
 6 contract claims in state court. (Id.)

7       Plaintiff refused and on October 13, 2020, Plaintiff wrote Kongsgaard stating that a meet  
 8 and confer was required prior to filing a Rule 11 request for sanctions. (Decl. of M. Palozola, ¶ -  
 9 7.) On October 14, 2020, Kongsgaard requested that Plaintiff delay the hearing date on this  
 10 Motion to allow the parties time to meet and confer. (Decl. of M. Palozola, ¶ 8, Ex. 2.) As of the  
 11 time this Opposition has been filed, no response has been received from Plaintiff. (Id.)

12 **IV. PLAINTIFF'S AMENDED COMPLAINT ALLEGATIONS**

13       Plaintiff's proposed first amended complaint in this case alleges the following causes of  
 14 action against Martha Kongsgaard, Peter Goldman, Al Czap and Peter Peletta: (1) Racial  
 15 Discrimination in the Making or Enforcement of Contract; (2) Racial Discrimination in Real  
 16 Property Transactions; (3) Conspiracy to Deprive Equal Protection Under the Laws; and (4)  
 17 Failure to Prevent Conspiracy to Deprive Equal Protection Under the Laws. The crux of each of  
 18 these allegations is based on the underlying facts and legal allegations in dispute and pending  
 19 before Judge Victoria Wood in Napa Superior Court.

20       Plaintiff's first cause of action alleges a violation of 42 U.S.C. § 1981 against the  
 21 Kongsgaards. The crux of the allegations against Kongsgaard are that Kongsgaard "would have  
 22 complied with the PURCHASE AGREEMENT and allowed Plaintiffs<sup>3</sup> the benefits, privileges,  
 23 terms and conditions thereof" and sold Plaintiffs 550 Stonecrest Drive but for Plaintiffs' race.  
 24 (FAC, p. 12, lines 7-11.) Plaintiff's second cause of action alleges a violation of 42 U.S.C. §  
 25 1982 against the Kongsgaards. The crux of the allegations are that "Kongsgaard refused to

26 \_\_\_\_\_  
 27 <sup>3</sup> Plaintiff seeks to join his wife, Laura Wang, as an additional plaintiff in this action. Thus, the Wangs are  
 28 collectively referred to as "Plaintiffs" in reference to the proposed first amended complaint where  
 appropriate.

1 comply with the executed Purchase Agreement and denied Plaintiffs' rights as provided therein”  
 2 and further that Kongsgaard has “interfer[ed] with the maintenance of the water pump on 460  
 3 Stonecrest, interfer[ed] with the work of Plaintiffs' gardeners in the easement area of 550  
 4 Stonecrest, strip[ed] out trees and plantings which provided cover from the road on or near the  
 5 front of 460 Stonecrest, trespass[ed] on 460 Stonecrest without permission or consent.” (FAC, p.  
 6 13, lines 6-24.)

7 Plaintiff's third cause of action alleges a violation of 42 U.S.C. § 1985(3) against the  
 8 Kongsgaards, Mr. Peletta and Mr. Czap. The crux of the allegations again are that Plaintiffs have  
 9 been “denied the right to make and enforce a contract to purchase real property, to purchase and  
 10 hold real property, and quiet enjoyment of the same” and, further, plaintiffs have been deprived  
 11 “the use and enjoyment of their easement and 460 Stonecrest” as a result of the communications  
 12 between the parties and Napa County surrounding the code violation enforcement actions against  
 13 the Plaintiffs for their illegal construction. (FAC, p. 14 line 28, p. 15 lines 1-8.) Plaintiff's fourth  
 14 cause of action alleges a violation of 42 U.S.C. § 1985 against the Kongsgaards, Mr. Peletta and  
 15 Mr. Czap. The crux of the allegations again are that Kongsgaard has engaged in racial animus  
 16 and, as a result, “Plaintiffs have been denied the right to make and enforce contracts and  
 17 purchase and hold real property, and PLAINTIFFS have suffered the loss of personal property  
 18 and the fruits of their labor, anguish, humiliation, distress, inconvenience, and loss of enjoyment”  
 19 because of Kongsgaard's actions. (FAC, p. 18, lines 18-22.)

## 20 V. LEGAL ANALYSIS

### 21 A. Plaintiff Fails To Meet His Legal Burden To Overturn This Court's Order 22 Staying This Case.

23 The *Colorado River* doctrine provides that in the presence of a concurrent state court  
 24 proceeding, a federal court can abstain from hearing an action based on “considerations of [w]ise  
 25 judicial administration, giving regard to conservation of judicial resources and comprehensive  
 26 disposition of litigation.” (*Colorado River Water Conservation District v. United States*, 424  
 27 U.S. 800, 817 (1976).) The Supreme Court has set forth various factors that a district court  
 28 should consider when assessing the appropriateness of a stay or dismissal in light of concurrent

1 state court proceedings. These factors include (1) assumption by either court of jurisdiction over  
 2 the res or property at dispute in the lawsuit, (2) the inconvenience of the federal forum, (3) the  
 3 desirability of avoiding piecemeal litigation, and (4) the order in which jurisdiction was obtained  
 4 by the concurrent forums. (*Id.* at 818.) In *Moses H.*, the court also found relevant to the inquiry  
 5 (5) whether federal law provides the decision on the merits, and (6) the probable inadequacy of  
 6 the state court proceeding to protect the parties' rights. (*Moses H. Cone Memorial Hospital v.*  
 7 *Mercury Construction Corp.*, 460 U.S. 1, 23, 26 (1983).)

8       However, “[n]o one factor is necessarily determinative; a carefully considered judgment  
 9 taking into account both the obligation to exercise jurisdiction and the combination of factors  
 10 counseling against that exercise is required.” (*Colorado River* 424 U.S. at 818–19 (citing *Landis*  
 11 *v. N. Am. Co.*, 299 U.S. 248, 254–55, (1936).) The factors are “to be applied in a pragmatic,  
 12 flexible manner with a view to the realities of the case at hand.” (*Moses H.*, 460 U.S. at 21;  
 13 *Travelers Cas. & Sur. Co. of Am. v. Comerica Bank*, No. CIV S-08-366 FCD/KJM, 2009 WL  
 14 2136922, at \*3 (E.D. Cal. July 15, 2009).)

15       Here, Plaintiff seeks to remove all state law claims from his complaint and replace them  
 16 entirely with federal law claims.<sup>4</sup> Plaintiff argues that the only reason this Court stayed this  
 17 action was because of the risk of conflicting outcomes and that because he now alleges federal  
 18 civil rights claims this risk is no longer present. Notably, this is the only argument advanced by  
 19 Plaintiff in support of his Motion to lift the stay. (Motion, p. 7, lines 16-27.)

20       Plaintiff's argument is flawed and ignores the underlying facts and claims made in  
 21 support of his amended causes of action. First, as set forth more fully above in Section IV, *supra*,  
 22 the crux of each of one of Plaintiff's claims is racial discrimination based on enforcement of an  
 23 alleged contract with Kongsgaard to sell him real property, easement rights in 440 Stonecrest  
 24 Drive or 550 Stonecrest Drive, and trespass and interference on his own property, 460 Stonecrest  
 25

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26       <sup>4</sup> State courts enjoy concurrent jurisdiction over section 1981, *et. seq.* and federal civil rights  
 27 claims as alleged by Plaintiff herein. (*DeHorney v. Bank of Am. Nat. Tr. & Sav. Ass'n*, 879 F.2d  
 459, 463 (9th Cir. 1989); Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 2A-3.)

1 Drive. All of these legal issues are currently being adjudicated in the state court proceeding.  
 2 Thus, whether or not the claims in this action have any merit will depend entirely on the  
 3 judgment in the state court proceedings regarding the disposition of the respective parties' legal  
 4 rights to the real property.

5 For example, Kongsgaard cannot as a matter of law be found to have interfered with  
 6 Plaintiff's contract rights to purchase a portion of 550 Stonecrest Drive (based on racial animus  
 7 or otherwise) if the state court finds that no contract exists between the parties in the first place.  
 8 Similarly, Kongsgaard cannot be found to have interfered with Plaintiff's easement rights in 550  
 9 Stonecrest Drive (based on racial animus or otherwise) if the state court finds that Plaintiff has  
 10 no easement or other property rights in 550 Stonecrest Drive. In sum, all of the amended causes  
 11 of action alleged in this case rise and fall on the adjudication of the underlying legal issues set for  
 12 trial on March 18, 2021, before Judge Victoria Wood in Napa County Superior Court. Whether  
 13 the Kongsgaards had a right to defend their property boundary and whether they complied with  
 14 the alleged agreement to sell additional land to the Wangs are crucial state court determinations  
 15 that should and indeed must be adjudicated first. This is precisely why Plaintiff's federal court  
 16 challenge—which the Kongsgaards consider frivolous and harassing—should continue to be  
 17 stayed.

18 Indeed, courts stay cases implicating *in rem* proceedings such as this one precisely  
 19 because it presents problems litigating the dispute when a sister court already has jurisdiction  
 20 over the rights and obligations over the real property at issue. Indeed, this Court aptly held as  
 21 much in its May 15, 2019, Order when it decided to stay this action:

22 When the proceedings are in rem or quasi in rem that factor is dispositive [in staying the  
 23 action] because "the forum first assuming custody of the property as issue had exclusive  
 24 jurisdiction to proceed." 40235 Washington Street Corp. (citing Colorado River, 424 U.S.  
 25 at 819.) This factor "applies when both forums exercise jurisdiction over the same  
 26 property, and addresses the concern 'that parallel proceedings will result in inconsistent  
 27 dispositions of [such property].'" Montarnore, 867 F. 3d at 1166 (quoting Seneca Ins.  
 Co., Inc. v. Strange Land, Inc., 862 F. 3d 835, 840 (9<sup>th</sup> Cir 2017)). Here, Defendant's  
 28 state court complaint seek quite title to the 550 Stonecrest property, which is the same  
 property that is the subject of Plaintiff's complaint in this court. "A quite title action is a  
 proceeding in rem," so a stay of these proceedings is required. 40235 Washington Street  
 Corp., 976 F. 2d at 589. (RJN, ¶ 4, Ex. D.)

1        Thus, while Plaintiff tries to skirt and obfuscate the real property issues in dispute by  
 2 couching his claims as claims based on racial animus, the underlying issue remains the same:  
 3 who holds a property right in the portions of real property and should Plaintiff obtain equitable,  
 4 declaratory and injunctive relief over that real property?

5        Tellingly, Plaintiff fails to address this issue anywhere in his Motion. Courts uniformly  
 6 hold that a party who fails to raise an argument in a motion waives that argument. (*See United*  
 7 *Nat'l Maint., Inc. v. San Diego Convention Ctr. Corp.*, Case No. 07-2172 AJB, 2012 U.S. Dist.  
 8 LEXIS 126205, at \*8-9 (S.D. Cal. Sept. 5, 2012) (finding that a party waived its “waiver”  
 9 argument by not raising it in its opposition to motion for new trial); *Sathianathan v. Smith*  
 10 *Barney, Inc.*, Case No. 04-02130 SBA, 2009 U.S. Dist. LEXIS 20354, at \*30-31. (N.D. Cal. Mar.  
 11 2, 2009) (party waived argument by not raising it in its opposition to motion to confirm  
 12 arbitration award.)

13        Further, case law is clear that exact parallelism between the state court proceeding and  
 14 the federal court proceeding is not required to stay the action under the *Colorado River* doctrine.  
 15 (*See e.g., California Pac. Bank v. Bank of Am.*, 2009 WL 1626378, at \*4 (N.D. Cal. June 8,  
 16 2009) (denying motion to lift stay when, regardless of state court proceedings, the “same core  
 17 issue . . . remains at the heart of both cases”); *Travelers Cas. & Sur. Co. of Am. v. Comerica*  
 18 *Bank*, 2009 WL 2136922, at \*4 (E.D. Cal. July 15, 2009) (denying motion to lift stay when  
 19 “none of the subsequent developments in either of the two state court actions change the fact that  
 20 those actions and this action are substantially similar” and further that “the desirability of the  
 21 avoiding piecemeal litigation overwhelmingly supports issuance of a stay.”); *Gallagher v. Dillon*  
 22 *Grp. 2003-I*, No. CV-09-2135-SBA, 2010 WL 890056, at \*3 (N.D. Cal. Mar. 8, 2010.) citing to  
 23 *Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir. 1988) “[T]he two  
 24 proceedings are substantially similar . . . [where] “substantially the same parties are  
 25 contemporaneously litigating substantially the same issues in another forum.”)

26        Here, Plaintiff himself concedes that the cases arise out of the same facts and  
 27 circumstances as the pending state court proceeding. (*See e.g.*, Motion, p. 7, lines 18-20, “the  
 28

1 federal civil rights claims arise out of the same facts and similar circumstances as the original  
 2 state law claims,” and Motion, p. 5, lines 12-15, Plaintiff’s claims “directly relate to the same  
 3 frustrated purchase agreement with Kongsgaard and claimed easement rights that initially gave  
 4 rise to the legal action.”) And, tellingly, every single factual allegation that supports the basis of  
 5 Plaintiff’s federal causes of actions either verbatim echoes the allegations in the state court  
 6 proceeding that is being adjudicated or implicates the real property dispute and communications  
 7 with Napa County’s code enforcement team. Accordingly, by Plaintiff’s own admission and by  
 8 his allegations as plead, this Court’s stay should remain in place. And, as evidenced by the  
 9 above, the risk of inconsistent rulings and piecemeal litigation in this action is substantial.

10 Finally, there is no prejudice to Plaintiff if this action remains stayed. Plaintiff availed  
 11 himself of the state forum by initiating legal action as plaintiff in the *Wang, et al. v. Peletta*  
 12 matter. (RJN, ¶ 7, Ex. G.) He filed a cross-complaint in the state court action against Kongsgaard  
 13 and has now filed a motion for leave to amend his first amended cross-complaint against  
 14 Kongsgaard and to add Mr. Al Czap. (RJN) Trial in the *Peletta* matter is set less than thirty days  
 15 on November 12, 2020. (Decl. of M. Palozola, ¶ 4.) Trial in the Kongsgaard matter is set for  
 16 March 18, 2021. (Id. at 5.) At most, Plaintiff’s case would be stayed five months while the state  
 17 court cases proceed to trial. Indeed, it is hard to see Plaintiff’s eleventh-hour Motion as nothing  
 18 other than a continued attempt to delay the parties’ resolution of the real property disputes and  
 19 distract from the real issues at hand in Napa County Superior Court.

20           **B. Plaintiff’s Amendment Is Sought In Bad Faith And Is Futile.**

21 Leave to amend should be granted unless the amendment would cause prejudice to the  
 22 opposing party, is sought in bad faith, is futile, or creates undue delay. (*John v. Mammoth*  
 23 *Recreations, Inc.*, 975 F. 2d 604, 607 (9th Cir. 1992).) While leave to amend “shall be freely  
 24 given when justice so requires,” it “is not to be granted automatically.” (*In re Western States*  
 25 *Wholesale Natural Gas Antitrust Litig.* 715 F3d 716, 738 (9th Cir. 2013).)

26 Here, Plaintiff’s Motion seeking leave to amend his complaint fails on its merits and is  
 27 therefore futile. In his proposed First Amended Complaint, Plaintiff alleges the following causes  
 28

1 of action: (1) Racial Discrimination in the Making or Enforcement of Contract; (2) Racial  
 2 Discrimination in the Real Property Transactions; (3) Conspiracy to Deprive Equal Protection  
 3 Under the Laws; and (4) Failure to Prevent Conspiracy to Deprive Equal Protection Under the  
 4 Laws against Martha Kongsgaard and Peter Goldman. The crux of each of these allegations is  
 5 based solely on one email communication made in response to Mr. Al Czap's email wherein  
 6 Plaintiff predicted that Mr. Al Czap would die a violent death. (FAC, Exs. G & H; Decl. of M.  
 7 Palozola, ¶ 6, Ex.1.)

8 Plaintiff alleges that "newly discovered information" was obtained in the state court  
 9 action specifically in discovery document production which form the basis for him to amend his  
 10 complaint. (Motion, p. 5, lines 5-9.) However, Plaintiff has had all email communications he  
 11 bases his amendment and new factual allegations on for almost a year—since December of 2019.  
 12 (Decl. of M. Palozola, ¶ 9, Ex. 3, ¶ 10.)

13 Since that time, Plaintiff affirmatively represented to this Court just thirty days ago on  
 14 September 1, 2020—that "the [federal] matter will conclude in state court and obviate the need  
 15 to litigate in this court." (RJN, ¶ 12, Ex. L.) Accordingly, Plaintiff's belated argument that  
 16 purportedly "newly discovered information" supports his amendment is unsupported by the  
 17 evidentiary record in the state court proceeding at best and misleading to this Court at worst.

18 Moreover, Plaintiff deposed the Kongsgaards and their testimony at deposition revealed  
 19 no evidence of racial animus in any manner relative to this real estate dispute or otherwise.  
 20 (Decl. of M. Palozola, ¶ 12.) The Kongsgaards' email and verbal communications makes no  
 21 mention of Plaintiff's nationality. (Decl. of M. Palozola, ¶ 6.) The alleged discriminatory email  
 22 appended to the motion does not on its face reflect any racial animus or motivation for the  
 23 negotiating what is simply a "garden variety" property line and alleged breach of contract  
 24 dispute. On the contrary, the Kongsgaards words, at most, reflect their frustration with Plaintiff's  
 25 encroachment onto their property, the difficulties of reaching an amicable settlement with them,  
 26 and surprise at Plaintiff's threatening statements made to Mr. Czap. On the face of the pleading,  
 27 it is clear that Plaintiff's amendment is futile, brought in bad faith, and would only cause delay  
 28

1 and prejudice to Kongsgaard with an impending trial date in her state court action.

2       **C. Plaintiff And Counsel Are Subject To Sanctions Under Rule 11.**

3       Any pleading filed in federal court must be certified by an attorney who represents that  
 4 “to the best of the person's knowledge, information, and belief, formed after an inquiry  
 5 reasonable under the circumstances” the pleading is not presented for an improper purpose to  
 6 cause unnecessary delay or increase the costs of litigation, that the claims and legal contentions  
 7 are warranted by a nonfrivolous argument, and that the factual contentions have evidentiary  
 8 support. (Fed. R. Civ. Pro. § 11.) Rule 11—after specifying, *inter alia*, that an attorney's  
 9 signature on a pleading constitutes a certificate that he has read it and believes it to be well  
 10 grounded in fact and legally tenable—provides that, if a pleading is signed in violation of the  
 11 Rule, the court “shall” impose upon the attorney or his client “an appropriate sanction, which  
 12 may include an order to pay to the other party or parties the amount of the reasonable expenses  
 13 incurred because of the filing of the pleading, ... including a reasonable attorney's fee.” (*Cooter*  
 14 & *Gell v. Hartmarx Corp.*, 496 U.S. 384, 384 (1990).)

15       Here, Plaintiff's Motion to amend his complaint fails on all accounts. First, the  
 16 underlying dispute and factual allegations contained therein are based entirely on the  
 17 encroachment and contractual property disputes stayed in this action and already pending in  
 18 Napa County Superior Court, Case No. 19CV000286. The filing of this Motion is merely a  
 19 pretext to obfuscate the issues and propel a second round of motion practice between the parties  
 20 when this Court already adjudicated the matter and stayed the action on May 15, 2019.

21       Moreover, the exhibits affixed to Plaintiff's first amended complaint are intentionally  
 22 truncated and misleading. Exhibits H and G to the first amended complaint are the sole basis for  
 23 any factual assertion of racial animus levied against Kongsgaard; However, Plaintiff  
 24 intentionally omitted the full e-mail string between the parties. The full e-mail string between the  
 25 parties was initiated by Mr. Al Czap who transmitted a video recording wherein Plaintiff  
 26 predicted that Mr. Czap would die a violent death. (Decl. of M. Palozola, ¶6.) Intentionally  
 27 truncating the e-mail correspondence between the parties to misconstrue the parties'

1 communication misleads this Court and is sanctionable conduct under Rule 11.

2 Upon receipt and review of this Motion on October 8, 2020, counsel for Kongsgaard  
3 emailed Plaintiff's counsel advising them of the sanctionable conduct and thereafter requested  
4 that Plaintiff delay the hearing date on this Motion to allow the parties time to meet and confer.  
5 As of the time this Opposition has been filed, no response has been received.<sup>5</sup>

6 **VI. CONCLUSION**

7 For the reasons stated above, Kongsgaard respectfully requests that this Court deny  
8 Plaintiff's Motion to lift the stay. Should this Court be inclined to lift the stay, Kongsgaard  
9 respectfully requests that this Court continue the hearing date on the amendment to coincide with  
10 Kongsgaard's forthcoming Motion for Sanctions.

11  
12 Dated: October 14, 2020

**CLARK HILL LLP**

13  
14 By: /s/ Timothy M. Flaherty

15 Timothy M. Flaherty

16 Melissa M. Palozola

17 Attorneys for Plaintiffs and Cross-Defendants,  
18 MARTHA KONGSGAARD, individually and  
as Trustee of the Martha Kongsgaard GST  
Exempt Trust U/T/A dated October 21, 1993;  
JOHN KONGSGAARD and MARY  
KONGSGAARD

20  
21  
22  
23  
24  
25  
26 <sup>5</sup> Should this matter proceed as calendared, the Kongsgaards intend to seek Rule 11 sanctions  
27 with respect to this Motion against Plaintiff and counsel and respectfully request that this Court  
28 continue the hearing on this Motion so that both matters can coincide to be heard on the same  
day.

1  
2                   **CERTIFICATE OF SERVICE**  
3

4                   I hereby certify that a true copy of the foregoing was filed *via* CM/ECF on October 14,  
5 2020 and as a result has been served on all counsel of record via transmission of Notices of  
6 Electronic Filing generated by CM/ECF.  
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